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December 29, 2003

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition for Expedited Forbearance of the Verizon Telephone Companies, WC Docket No. 03-157

Dear Ms. Dortch:

Please file the attached letter to Mr. M. Brill in the above proceeding. If you have any questions, feel free to call me.

Sincerely,

Dee May

Attachment

cc: J. Carlisle
J. Dygert
D. Gonzalez
C. Libertelli
W. Maher
T. Priess
J. Stanley
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December 29, 2003

Mr. Matthew Brill
Senior Legal Advisor
Commissioner Kathleen Abernathy's Office
445 12th Street, SW 8th Floor
Washington, DC 20554

Re: Petition for Expedited Forbearance of the Verizon Telephone Companies, WC Docket No. 03-157

Dear Mr. Brill:

In response to your question raised at the December 19, 2003 meeting with Verizon on the above topics (see December 22 Ex Parte), please find attached excerpts from parties' comments in the Verizon Forbearance Petition where the 10(d) issue has already been addressed. These excerpts show that the parties have already briefed the 10(d) issue, so there is no reason for the commission to put this issue out for further comment.

Please contact me if you have any questions or require additional information.

Sincerely,

Dee May

Attachment

Verizon Reply Comments (pp. 28-31)

C. Forbearance Here Would Be Consistent with Section 10(d).

The CLECs argue that the Commission cannot grant the petition because it cannot "forbear from applying *the requirements of section 251(c)*" before "those requirements have been fully implemented," in violation of section 10(d). *See* 47 U.S.C. § 160(d) (emphasis added). *See, e.g.*, AT&T Comments at 22-28; Z-Tel Comments at 16; CA PUC Comments at 12. This is wrong on three independent levels.

First, as discussed above, nothing in the Act, much less in section 251(c), "requires" either TELRIC or the availability of the UNE platform or the UNE-P access charge pricing rule. Rather, these are all the creatures of discretionary Commission regulation, not "requirements" of the Act itself. This point is dispositive, for section 10(d) only limits the Commission's right to "forbear from applying the requirements of section 251(c)," not to forbear from its own discretionary regulations.

AT&T implausibly contends that section 10(d) should be read as though it denied the Commission all authority to forbear *both* from the statutory requirements of section 251(c) *and* from the Commission's discretionary regulations under that provision. AT&T Comments at 23-24. But that argument, which contradicts AT&T's own position elsewhere,[1] defies the statutory text. Whereas section 10(a) reflects a broad new grant of statutory authority that, for the first time, authorizes the Commission to forbear from "any regulation *or any provision* of this Act" (emphasis added), section 10(d) reflects only a narrow and temporary limit on that forbearance authority with respect to "the requirements of sections 251(c) or 271" themselves. Congress thereby restricted the Commission's authority to forbear from the requirements of those two specific statutory provisions for a limited period of time (i.e., until they are "fully implemented"); it did *not* restrict the Commission's authority to forbear from discretionary

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[1] See *Letter from Mark Rosenblum, AT&T, to Chairman Powell and Commissioners, CC Dkt. No. 01-338, at 7 (Dec. 18, 2002) (arguing that, for preemption purposes, "the lawfulness of a state regulation [is measured] by its consistency with [the]* Act *and its purposes,* not *by its consistency with the Commission's regulations or policy preferences") (emphasis in original).*

regulations that the Commission could eliminate anyway through a variety of other procedural mechanisms.[2]

Second, even if the Commission could forbear from the application of TELRIC to the platform only after first determining that the requirements of section 251(c) "have been fully implemented" in Verizon's states, the Commission has in fact already made that determination. When it granted section 271 relief for all of Verizon's states, the Commission found that Verizon had "*fully implemented* the competitive checklist" of section 271. 47 U.S.C. § 271(d)(3)(A)(i) (emphasis added). Because the checklist incorporates by reference all applicable "requirements of section 251(c)," *id.* § 271(c)(2)(B)(ii), it follows that the Commission has also found that, in Verizon's states, those requirements have been "fully implemented."[3]

Although MCI and AT&T argue that the term "fully implemented" has two mutually contradictory meanings in sections 10(d) and 271(d)(3)(A)(i), AT&T Comments at 24-29; MCI Comments at 23-28, they provide no basis for flouting the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."[4] That rule is particularly relevant here, since section 10(d) not only coexists in the same legislative enactment as section 271, but explicitly *addresses* section 271 as an exception in the very forbearance limitation at issue.

The CLECs contend that, as a policy matter, if the Commission can forbear from section 251(c)'s requirements once a BOC receives section 271 authorization, nothing would stop the BOC from "backsliding." AT&T Comments at 24-25; MCI Comments at 24-26. But this argument wrongly presumes that the section 271 checklist requirements immediately vanish once a section 271 application is granted. In reality, the Commission retains authority to enforce those

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[2] *Nothing in the* 1998 Biennial Review Order *is to the contrary, despite the misleading suggestion of some CLECs.* See *AT&T Comments at 23-24 & n.24; MCI Comments at 21. In that* Order, *the Commission stated only that it may not forbear from the requirements of sections 251 and 271, and it then noted that it was not* proposing *to forbear from those "provisions or the regulations implementing" them. Notice of Inquiry*, 1998 Biennial Regulatory Review — Testing New Technology, *13 FCC Rcd. 21879, 21896 ¶ 32 (1998). The Commission did not analyze (much less decide) whether such regulations were encompassed within section 10(d).*

[3] *Of course, this does not mean that the checklist requirements in section 271 are immediately inapplicable once a section 271 application is granted. Rather, at that point, once those requirements are "fully implemented," the Commission has the authority to forbear from some aspect of those requirements* if *it finds that the statutory criteria of section 10 are met, as they are here.*

[4] Commissioner v. Lundy, *516 U.S. 235, 250 (1996) (quoting* Sullivan v. Stroop, *496 U.S. 478, 484 (1990)).*

requirements until and unless it affirmatively finds that the substantive criteria of section 10(a) are met as to a specific checklist requirement. Thus, the Commission would retain any and all existing authority to enforce, and to prevent "backsliding" with respect to, all requirements of the competitive checklist that continue to apply. And by definition, the only requirements that would not continue to apply are those that the Commission expressly finds are unnecessary under the standards of section 10(a) — in which case there obviously is no backsliding concern.

Finally, even if section 251 required TELRIC or the UNE-P — which it does not — section 10(d) does *not* state that the Commission may not forbear from applying *any* requirement of section 251 until it finds that *all* such requirements have been "fully implemented." Instead, it provides only that "the Commission may not forbear from applying the requirements of section 251(c) . . . until it determines that *those* requirements" — *i.e.*, the ones from which forbearance is sought—"have been fully implemented." 47 U.S.C. § 160(d) (emphasis added). Here, Verizon seeks forbearance only from the application of TELRIC to the platform and from the rule requiring IXCs to pay access charges to platform-based CLECs rather than incumbents.

AT&T Comments (pp. 22-29)

II. VERIZON'S PETITION IS PREMATURE AND CANNOT BE GRANTED, BECAUSE SECTIONS 251 AND 271 ARE NOT "FULLY IMPLEMENTED."

Verizon's petition must also be dismissed as premature. Section 10(d) places an explicit "[l]imitation" on the remainder of section 10, providing that the "Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). Because the Commission has never determined that sections 251(c) and 271 have been fully implemented - and plainly could not do so on the record provided here – it has no authority to grant a request that it forbear from applying any UNE-related requirements of section 251(c).

Verizon acknowledges this problem only in a footnote, arguing principally that the Petition does not trigger section 10(d). "[N]either TELRIC [n]or UNE-P" is a "requirement" of section 251(c) or 271, Verizon contends, because both are creatures of the Commission's *regulations* implementing those sections of the Act. *See* Pet. at 19 n.38. But the plain text of the Act makes clear that Congress used the term "requirement" broadly to include both the

"provisions" of the Act *and* the Commission's implementing "regulations." For example, section 252(e)(2)(B) forbids a state commission from approving an interconnection agreement "if it finds that the agreement does not meet the requirements of section 251 of this title, *including the regulations prescribed by the Commission pursuant to section 251 of this title."* 47 U.S.C. § 252(e)(2)(B) (emphasis added).[5] That result would necessarily follow even in the absence of such a clear statement, however, because the Commission's rules are authoritative interpretations of the *Act's* requirements. *See, e.g.*, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Chrysler Corp. v. Brown*, 441 U.S. 281, 296-96 (1979) (properly promulgated agency regulations "have the force and effect of law").

Indeed, the Commission has already recognized that the term "requirement" in section 10(d) applies both to "statutory provisions" and to "implementing regulations." Notice of Inquiry, *1998 Biennial Review,* 13 FCC Rcd. 21879, ¶ 32 (1998). In its *1998 Biennial Review,* the Commission stated that its regulations implementing section 251 - including its TELRIC rules, its rules on UNE combinations and UNE-P, and its prohibition against limiting competitive carriers from providing exchange access and other telecommunications services with network elements - constitute "requirements" of section 251(c).[6] Thus, any petition seeking forbearance from any of those requirements plainly must first establish the section 10(d) pre-condition that sections 251(c) and 271 have themselves been "fully implemented."[7]

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[5] *Likewise in section 251(b)(2), local exchange carriers are obligated to provide "number portability in accordance with the requirements prescribed by the "Commission." 47 U.S.C. § 251(b)(2).*

[6] Section 251(c)(3) states that incumbent carriers must provide UNEs at "rates" that are "just, reasonable, and nondiscriminatory" and that are "in accordance with ... the requirements of this section and section 252." Thus, section 251(c)(3) both expressly provides that "just, reasonable, and nondiscriminatory" network element rates are a requirement of that provision and, by incorporation, that the "cost-based" pricing requirements of section 252 are a requirement of that provision. This express incorporation is likewise reflected in section 252(d)(1). That provision states that it governs "the just and reasonable rate for network elements for *purposes of subsection (c)(3)."* (Emphasis added).

[7] *See also Number Portability Order 17 FCC Rcd. 2578, ¶ 61 (2002) ("[T]he Commission has found that section 251(c)(3) requires incumbent LECs to price unbundled network elements under the TELRIC pricing methodology"); Local Competition Reconsideration Order, 12 FCC Rcd. 12460, ¶ 47 (1997) ("Section 251(c)(3) requires incumbent LECs to make available unbundled network elements at cost-based rates"); Local Competition Order ¶ 15 ("The statute addresses this problem [of incumbent control of bottleneck facilities] by creating an arbitration proceeding in which the new entrant may assert certain rights, including that the incumbent's prices for unbundled network elements must be 'just, reasonable and nondiscriminatory.' We adopt rules herein to implement these requirements of section 251(c)(3)").*

Verizon claims in the alternative that "once a carrier receives long distance authority in a given state, the Commission itself has concluded that th[e] requirements [of section 251(c) and 271] have been fully implemented." Petition at 19 n.38. According to Verizon, the provision of section 271(d)(3)(A)(i) that precludes the Commission from approving a section 271 application until the BOC provides an interconnection agreement that "fully implements" the competitive checklist must also be interpreted as a finding that the BOC has "fully implemented" *all* of sections 251(c) and 271 immediately upon approval of a section 271 application. This is the quintessentially "absurd result" that must be avoided in interpreting every statute. Under Verizon's construction of section 10(d), the Commission could, the very *moment* after granting Verizon long distance authority premised on findings that Verizon's continuing compliance with sections 251(c) and 271 would open local markets up to the possibility of competition, end that possibility and return to the pre-Act "unregulated world" in which Verizon enjoyed an "almost insurmountable competitive advantage." *Verizon, 535* U.S. at 490-91.

Not surprisingly, Verizon's position cannot be reconciled with section 10(d)'s terms, which require, at a minimum, the ubiquitous availability of cost-based wholesale alternatives to incumbent carriers' bottleneck facilities, such that the incumbent carriers would no longer be deemed dominant in local services markets. The word "implement" means "to carry into effect, fulfill, accomplish" and to "give practical effect to." And the word "fully" means "totally or completely." Webster's New World Dictionary. Sections 251(c) and 271 will be "fully implemented," therefore, when a practical effect results: namely, when ubiquitous and durable local competition *actually exists* and the incumbents no longer control bottleneck facilities. *Cf. Verizon,* 535 U.S. at 532, 538 (upholding Commission rules that interpret the "statutory dut[ies]" of section 251(c) to "reach the result the statute requires" and thereby "get[] a practical result").

The requirements of 251(c) and 271 are not fully implemented, according to the plain meaning of those terms, where, as is the case today, (i) final, unchallenged rules that implement the duties and obligations of section 251(c) are not currently in effect; (ii) the key cost principles that are used to determine prices for network elements and interconnection required to be provided under those sections are to be the subject of an upcoming Commission rulemaking; (iii) state commissions have yet to apply and "implement" any new rules (and, indeed, have not even finished implementing the prior rules); (iv) none of these new rules or pricing principles have been implemented in the interconnection agreements; and (v) local competition remains nascent,

with no reason to believe that it could ever become robust if the Commission were now, as Verizon urges, to pull the rug out from under cost-based UNE-P. State commissions' varied regulatory activity confirms that section 10(d) is not satisfied: what are the commissions and parties before them doing, if not "implementing" section 251(c)'s requirements?[8]

Further, in the same section 271 decisions that Verizon claims the Commission has found the BOCs to have "fully implemented" sections 251(c) and 271 for purposes of section 10(d), the Commission has expressly stated that "obtaining section 271 authorization is *not* the end of the road" and that the "critically important power" in section 271 (d)(6) "underscores Congress's concern that BOCs *continue to comply* with the statute."[9] The Commission could not have made these pledges in each of its section 271 orders if it were simultaneously finding that sections 251(c) and 271 have themselves been fully implemented.[10]

Verizon bases its interpretation of section 10(d) entirely on a "canon" of statutory construction that the courts have stressed in this context (and many others) cannot bear the weight that Verizon assigns it - namely, that identical words used in different parts of the same act generally are assumed to have the same meaning.[11] However, in interpreting the Communications Act, the courts and the Commission have on numerous occasions decided that the same term used in multiple sections of the Act should be interpreted differently when, as here, there are different purposes underlying the sections in which the term are used. Thus, for

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[8] The Act also manifestly contemplates that the requirements of sections 251(c)(3) and 271 will endure long after a BOC receives section 271 authorization: section 271(d)(6) provides the Commission with a special grant of permanent enforcement authority if the BOC ceases to meet any of the section 271 requirements. That section empowers the Commission to act *sua sponte,* requires the Commission to act within 90 days on any complaint alleging a violation of section 271, and authorizes the Commission to suspend or revoke a BOC's section 271 authority. All of these post-authorization administrative remedies and enforcement powers could be rendered impotent if, as Verizon contends, the Commission's section 271 decisions necessarily must also be deemed to have determined that a BOC has "fully implemented" sections 271 and 251(c)(3) within the meaning of section 10(d).

[9] *New York 271 Order* ¶¶ 448, 453 (emphases added).

[10] Further, Congress provided that section 272, which is designed to protect against the BOCs' use of enduring market power to harm the interLATA market after receipt of section 271 authorization, would endure for a *minimum* of three years after authorization. It is ludicrous to suggest that Congress intended that sections 251(c) and 271, the cornerstones of the Act's provisions to open markets to competition, could be eliminated far earlier.

[11] *See Ex Parte* Letter from Ann Berkowitz, Verizon, to Marlene Dortch, FCC (CC Docket 01-338, July 24, 2003)

example, the Commission refused to interpret the term "provide" in section 271(a) to reflect the construction it had given the same term in section 260(a). *AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd. 21438 (1998), *aff'd, US West Comm. Inc. v. FCC,* 177 F.3d 1057 (D.C. Cir. 1999). Finding that the term was ambiguous and that the legislative history was unhelpful, the Commission interpreted "provide" based on the specific policies underlying section 271. The D.C. Circuit affirmed, reasoning that it was entirely appropriate for "identical words" to have "different meanings where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different." *US West,* 177 F.3d at 1060.

Likewise, the D.C. Circuit, in recently upholding the Commission's interpretation of the term "necessary" in section 10(a), rejected the argument that the term "has precisely the *same* meaning in every statutory context." *CTIA,* 330 F.3d at 510-11. Previous constructions of the term "necessary" in sections 251(c)(6) and 251(d)(2) adopted by the Supreme Court and by another panel of the D.C. Circuit reflected the particular purposes of those sections, and thus the interpretation of "necessary" in those sections did not need to be imported into a controversy "involv[ing] the application of the forbearance provision of the 1996 Act," particularly where it would lead to "an absurd result."[12] *Id.* at 511.

These same principles apply to the construction of "fully implemented" in section 10(d), because, as described above, construing that term as the Commission construed the same term in section 271(d)(3)(A)(i) would lead to an absurd result and ignore the differing purposes of the sections. Section 271(d)(3)(A)(i) requires only that the Commission find that a *BOC* has "fully implemented" the *competitive checklist* with regard to a single facilities-based interconnection agreement. It does *not* require a universal finding that sections 251(c) and 271 have themselves been fully implemented by all relevant parties - the state commissions, the BOCs, competing carriers, the Commission itself and federal courts - as section 10(d) requires. For example, a finding that a BOC has "fully implemented" the checklist for a particular interconnection agreement does not constitute a finding that the BOC will, as required by section 271(d)(3)(B),

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[12] See also The 2002 Biennial Regulatory Review, *18 FCC Rcd. 4726, ¶¶ 18-21 (2003) (refusing to construe the term "necessary" in section 11 to mean the same as that term had been interpreted in other sections of the Act).*

operate in accordance with the requirements of section 272.[13] Nor does it require a finding, consistent with section 251(c)'s objectives that enduring local competition has *in fact* developed. Rather, it is a prognosis that the market is sufficiently open to make a predictive judgment that competition *could* take root, not a determination that competition will in fact occur and thrive.

In contrast to section 271(d)(3)(A)(i), section 10(d) is intended to ensure that the very structure of local markets has changed and that they remain open *permanently* by limiting the Commission's ability even to *consider* requests for forbearance from any of the requirements of sections 251(c) and 271, which the Commission has properly found to be the very "cornerstones of the framework Congress established in the 1996 Act to open local markets to competition."[14] *Advanced Services Order,* 13 FCC Rcd. 24012, ¶ 73 (1998). There has not been, and could not be, any finding that the requirements of sections 251(c) and 271 have been fully implemented in even a single state, and the Petition must, accordingly, be dismissed as premature.

MCI Comments pp. 26-34

B. Section 10(d) Bars the Relief Requested by Verizon

Even if Verizon were able to meet the requirements of section 10(a), the Commission would have no authority to grant Verizon's requested relief because the petition fails to satisfy section 10(d). Section 10(d) of the Act states in relevant part that:

> the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.[15]

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[13] *And this is not an academic point: as AT&T and other commenters have explained and as even the inadequate audits of Verizon and other BOCs have demonstrated, the BOCs are flagrantly violating their section 272 obligations.*

[14] *In this regard, the full implementation language of section 10(d) can be viewed as analogous to the standard for vacatur of an injunction that is intended to serve a particular purpose. In that context, the courts look to see if the purpose of the injunction has been achieved, and will only vacate the injunction if it has in fact been achieved and there is little danger of relapse. For example, in cases involving unlawful restraints on trade, the Supreme Court said that a decree "may not be changed . . . if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved."* United States v. United Shoe Machinery Corp., *391 U.S. 244, 248 (1968). Likewise, courts have refused to permit an injunction to be vacated if the party subject to the injunction was likely to "return to its former ways" should the injunctive decree be lifted.* Board of Ed. Of Okla. City v. Dowell, *498 U.S. 237 (1991).*

[15] *47 U.S.C. § 160(d).*

The requirements of section 251(c) are continuing ones and cannot be said to have been fully implemented until Verizon loses its dominance in the local market in its region. Verizon still exercises market power such that the need to regulate the local market remains, as the Commission's Triennial decision makes clear. Thus, the Commission has no authority to forbear from applying the requirements of section 251(c).

Among those requirements is the requirement that unbundled elements be provided at cost-based rates. Specifically, Section 251(c)(3) requires incumbent LECs to provide access to unbundled network elements "on rates, terms and conditions that are just, reasonable and non-discriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."[16] Section 252(d)(1)(A), in turn, requires that the rates for access to such unbundled elements "be based on the cost ... of providing the ... network element."[17] The FCC's regulations implementing section 252(d)'s pricing standard, in turn, define cost-based to mean in accordance with Total Element Long Run Incremental Cost (TELRIC) pricing principles."[18]

The plain language of section 251(c)(3) thus unambiguously incorporates by reference the requirements of section 252, including the FCC's TELRIC pricing methodology. Section 10(d) thus prohibits the FCC from forbearing "from applying the requirements of section 251(c)" until those requirements have been "fully implemented."[19]

Verizon advances in a single, terse footnote two equally frivolous arguments in support of its claim that section 10(d) does not bar the forbearance relief requested in the petition .[20] First,

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[16] Id *§ 251(c)(3).*

[17] Id. *§ 252(d)(1)(A).*

[18] See 47 *C.F.R. § 51.501* et seq.

[19] *47 U.S.C. § 160(d).* See, e.g., United States v. Ron Pair Enterprises, Inc., *489 U.S. 235, 240-41 (1989) ("where ... the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms."') (citations omitted);* INS v. Cardoza-Fonseca, *480 U.S. 421, 431 & n.12 (1987) (the "ordinary and obvious meaning" of a statutory phrase "is not to be lightly discounted") (citations omitted);* Chevron U.S.A., Inc. v. Natural Resources Defense Council, *467 U.S. 837, 842-43 (1983) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").*

[20] See *VZ Petition at 19, n.38.*

Verizon erroneously claims that since "neither TELRIC nor UNE-P is required by the Act," they are not "requirements of section 251(c)" and, therefore, not covered by section 10(d) of the Act. Second, Verizon wrongly alleges that "once a carrier receives long distance in a given state, the Commission itself has concluded that those requirements [of sections 251(c) and 271] have been fully implemented."[21] Verizon's contention apparently is that a BOC that "has fully implemented the competitive checklist in [section 271(c)(2)(B)]" for purposes of obtaining in-region long distance authority automatically has fully implemented *all* of the requirements of section 251(c) for purposes of section 10(d). Both of Verizon's claims are specious.

1. *The "Requirements" of Section 251(c) Include the FCC's Implementing Regulations.*

Verizon's cryptic assertion that "neither TELRIC nor UNE-P is required by the Act"[22] suggests that Verizon views section 10(d)'s bar as extending only to the text of section 251(c) itself, and not to the FCC's regulations implementing that provision. The Commission, however, has rejected that reading of the statute. In a 1998 notice in the *Biennial Review* proceeding, the FCC explicitly recognized that the term "requirement" in section 10(d) includes both "statutory provisions [and] the regulations implementing those provisions."[23]

Moreover, this reading of section 10(d) is consistent with the text of section 251 and prior statements by the Commission regarding the role of its local competition rules. Section 251(d)(1) of the Act directed the Commission to "establish regulations to implement the *requirements* of [section 251]."[24] In the *Local Competition Order,* the FCC indicated that it was adopting nationwide unbundling rules, including the TELRIC pricing regulations, pursuant to a "broad delegation of authority that Congress gave the Commission to implement the *requirements* set forth in section 251."[25] Thus, the Commission's rules implementing section 251, including the

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[21] *See 47 U.S.C. § 271(d)(3)(A)(i).*

[22] *Id.*

[23] 1998 Biennial Regulatory Review, *Notice of Inquiry, 13 F.C.C.R. 21879, ¶ 32 (1998).*

[24] *47 U.S.C. § 251(d)(1) (emphasis added).*

[25] See Local Competition Order ¶*60 (emphasis added);* see also id. ¶ *116("Section 252 generally sets forth the procedures that state commissions, incumbent LECs, and new entrants must follow to implement the* requirements *of section 251 and establish specific interconnection arrangements.") (emphasis added).*

pricing rules, clearly represent the agency's most authoritative statement of what that statutory provision requires.

Verizon also appears to suggest that section 10(d) does not apply to the TELRIC pricing rules, because they are not the only rules that the FCC could have adopted to implement sections 251(c)(3) and 252(d)(1) of the Act and, for that reason, are not "requirements" within the meaning of section 10(d). This argument, however, is simply a variation of Verizon's assertion that section 10(d) does not apply to the FCC's regulations implementing section 251(c). The Commission almost invariably has discretion in adopting rules that specify requirements of a particular statutory provision. If the precise requirements of the statute were clear, there would be no need for the Commission to enact implementing rules.[26]

In the instant case, the FCC, the expert agency charged with enforcing the Act, concluded that the TELRIC rules will achieve the statutory mandate of cost-based charges for access to unbundled network elements more effectively than any of the alternative pricing methodologies that were advanced in the section 251 rulemaking.[27] Thus, the current rules reflect the Commission's considered judgment regarding the specific ratemaking rules that must be followed to comply with that statutory requirement. The fact that a different Commission might have reached a different determination regarding the rules that would best implement the statutory provisions is irrelevant. Until modified after notice and opportunity for comment, the current pricing rules represent the expert agency's determination of the requirements of sections 251 and 252 and, therefore, are covered by section 10(d).

Moreover, because Verizon seeks to have the FCC replace the existing TELRIC rules with pricing rules that apply to resold retail services and do not relate to the underlying costs of the facilities involved, grant of its petition plainly would violate the statutory requirement that the charges for network elements be "based on the cost ... of providing the ... network element.[28]

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[26] *The Commission, for example, did not commence a rulemaking to specify the requirements of section 271. Rather, it simply determined on a case by case basis whether an applicant satisfied the statutory requirements.*

[27] *Local Competition Order ¶¶ 683-686 (comparing three pricing methodologies and determining that TELRIC is superior),* id. *¶¶ 705-706 (rejecting embedded cost methodology);* id. *¶¶ 709-711 (rejecting the "efficient component pricing rule" (ECPR)).*

[28] *47 U.S.C. § 252(d)(1)(A). Verizon also asks that the FCC authorize the underlying facilities-based carrier to collect access charges for customers being served via UNE-P, rather than allowing the*

Thus, even under Verizon's untenable reading of the statute, section 10(d) bars the requested forbearance relief.

2. Section 251(c) Has Not Been "Fully Implemented"

Verizon's claim that section 10(d) does not bar the forbearance relief it seeks because it has fully implemented the requirements of section 251(c) is likewise without merit. Specifically, Verizon alleges that the Commission previously has found that the requirements of section 251(c) have been fully implemented when a carrier obtains in-region long-distance authority in a state .[29] To substantiate that claim, Verizon, however, does not cite an FCC order that contains such a statement. Rather, Verizon relies on a provision of section 271 which requires the Commission to find that a BOC "has fully implemented *the competitive checklist in [section 271(c)(2)(B)]* " in order to grant an application for in-region long-distance authority in a particular state.

Verizon thus confounds section 251 with section 271, and erroneously presumes that Congress intended to permit the FCC to refrain from enforcing the key market-opening requirements of the Act the instant that the Commission had determined that the BOC was actually complying with some of those requirements. This argument confuses what Congress required a BOC to show in order to gain in-region long distance authority with the showing required to satisfy section 10(d). Section 10(d) requires as a prerequisite of forbearance that a BOC fully implement *all* of the requirements of *section 251(c),* including continuing obligations, not just those requirements on the section 271 competitive checklist. Moreover, because of the different purposes of sections 271 and section 10, even with respect to those requirements on the checklist, full implementation for purposes of section 10(d) requires more than a determination that the checklist has been satisfied. The forbearance provision of section 10 is only triggered, in the words of Senator McCain, "when markets are deemed competitive."[30]

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competitive carrier to collect those charges as the rules currently provide. For the same reasons discussed above, this request runs afoul of 10(d)'s prohibition against forbearing from section 252(d)(1)'s requirement that rates for network elements be based on costs. See Local Competition Order ¶ *363 (concluding that imposition of access charges in addition to cost-based charges for unbundled elements would depart from the statutory mandate of cost-based pricing of elements).*

[29] See *VZ Petition at 19, n.38.*

[30] *141 Cong. Rec. S7956 (June 8, 1995) (statement of Senator McCain) (quoting from Heritage Foundation letter).*

As the Commission has held, section 271 requires a BOC seeking to obtain in-region long distance authority to show that it has *opened* its local markets to competitive entry.[31] But Congress did not require the BOCs to open their markets only to permit the BOCs immediately to close them again. Congress recognized that even after a BOC had satisfied the 271 checklist requirements and obtained in-region authority it would continue to be dominant in local telecommunications markets.[32] Consequently, Congress imposed on the Commission an ongoing obligation to ensure that a BOC continues to comply with the conditions it is required to satisfy to obtain section 271 approval, as well as the requiring each ILEC to continue to comply with the requirements of section 251. The Commission similarly has underscored the BOC's obligation to continue to comply with section 271 post-approval.[33]

Further, the Act and the FCC's section 272 implementing regulations establish safeguards designed to ensure that entrants would continue to have access under section 251(c) to the facilities and services they require to compete after a BOC's in-region entry.[34] Absent such continuing access, the Act's ultimate goal of fostering truly competitive local markets and deregulating the incumbent LECs could not be achieved.

It would have been completely irrational for Congress to have permitted the FCC to forbear from enforcing the requirements of 251(c) as soon as a BOC achieved interLATA authority, and it did not do so. Rather Congress required that prior to forbearance a BOC must fully implement *all* of the requirements of section 251(c), not just those on the competitive checklist.[35] The competitive checklist incorporates only subsections 251 (c)(2)-(4).[36] Critically,

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[31] *See, e.g., Texas 271 Order, ¶¶ 1, 419; New York 271 Order ¶¶ 1, 15, 426, 428.*

[32] *141 Cong. Rec. S8470 (June 15, 1995) (statement of Sen. Feingold) ("This checklist does not require that competition actually exist in local markets dominated by the RBOCs before they are able to use their substantial market power to enter long distance markets.").*

[33] See Texas 271 Order, ¶*434 (noting that "Section 271 approval is not the end of the road," that "[t]he statutory regime makes clear that [the BOC] must continue to satisfy the 'conditions required for . . . approval' after it begins competing for long distance business," and discussing "Congress's recognition that a BOC's incentives to cooperate with its local service competitors may diminish . . . once the BOC obtains section 271 approval.").*

[34] *See* 47 U.S.C. § 271(d)(6)(A).

[35] See *47 U.S.C. 160(d).*

the requirements of section 251(c) include a variety of other vital continuing obligations. Section 251(c)(1), for example, requires that an ILEC negotiate in good faith. Section 251(c)(5) requires the ILEC to provide reasonable public notice of changes necessary for routing of services. A BOC has not fully implemented these continuing obligations just because it has received interLATA authority. Indeed, neither of these ongoing obligations under section 251(c) is incorporated in the competitive checklist. Thus, a BOC's showing in a section 271 application does not even implicate other provisions of section 251(c) that, according to Verizon, the Commission has discretion to forbear from enforcing.

Moreover, a Commission decision to grant a section 271 application does not mean that section 10(d) has been satisfied even with respect to those 251(c) requirements that are on the checklist. Sections 251 and the 271 checklist serve fundamentally different purposes. As explained above, section 271 is used to determine whether a BOC has sufficiently opened its markets at a fixed point in time that it can be permitted to offer in-region long distance services. Section 251, on the other hand, contains the critical unbundling obligations that often will remain necessary for the market to be competitive on a continuing basis.

The fact that both section 10(d) and section 271(d)(3) use the phrase "fully implemented" does not mean that Congress intended for that phrase to have the same meaning in both provisions. As the District of Columbia Circuit has noted, "[o]n numerous occasions, both the Supreme Court and this court have determined, after examining statutory structure, context and legislative history, that identical words within a single act have different meanings."[37] In this

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[36] *47 U.S.C. § 271(c)(2)(B) (explicitly incorporating subsections 251(c)(2)-(4);* see Texas 271 Order ¶ 64 *(implicitly incorporating subsection 251(c)(6) into subsection 271(c)(2)(B) by stating that the "provision of collocation is an essential prerequisite to demonstrating compliance with item 1 of the competitive checklist").*

[37] Martini v. Federal National Mortgage Ass'n, *178 F.3d 1336, 1343 (D.C. Cir. 1999);* see also Atlantic Cleaners & Dyers, Inc. v. United States, *286 U.S. 427, 433 (1932) (presumption that identical words in an act have the same meaning "is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent"). Cases in which courts have assigned the same meaning to a word or phrase appearing more than once in a statute typically involve very different circumstances from those presented here. In a case involving a provision of the tax code, for example, the Supreme Court concluded that the term "overpayment" that appeared in different subsections of the same statutory provision should be given the same meaning in both subsections.* See Sorenson v. Secretary of the Treasury, *475 U.S. 851 (1986). Moreover, in the* Sorenson *case, the subchapter in which both subsections appear included an explicit definition of "overpayment," thus "strengthen[ing] the*

case, the same two words appear in different Titles of the Act in provisions that, as discussed above, have very different purposes. Consequently, the most reasonable reading of section 10(d) is that a BOC's satisfaction of the statute's section 271 requirements falls well short of the showing required to meet the requirements of section 10(d).

As MCI previously has shown,[38] the most reasonable construction of the "fully implemented" requirement in section 10(d) is that it is satisfied, in the words of Senator McCain, "when markets are deemed competitive."[39] Specifically, the Commission should not consider section 10(d) satisfied until it can conclude that in a relevant geographic area, a robust wholesale market exists that enables competing providers to obtain access to the telecommunications services and facilities they require to enter the market without the need for continued enforcement of Sections 251(c) and 271. Stated differently, the "fully implemented" standard requires a showing that a BOC no longer is dominant in the provision of the network elements and telecommunications services that entrants require to enter and compete effectively with the BOC.[40] The fact that section 10(d) applies to both section 251(c) and section 271 reinforces this reading of "fully implemented." Congress crafted a special limitation on forbearance for sections aimed at ensuring the development of local competition.

The conditions for forbearance under section 10(d) have not yet been established. Indeed, as MCI demonstrated in its UNE Triennial Comments, most local markets remain tightly shut and CLECs continue to be critically dependent on leasing UNEs from the BOCs. As a result, section 10(d) prohibits the FCC from forbearing to enforce its TELRIC pricing rules.

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presumption" that it has the same meaning throughout that subchapter Id. *at 860. Third, both subsections concerned the same subject matter, namely treatment of overpayments.* Id. *None of these factors is present in the instant case.*

[38] *See Comments of WorldCom, Inc. on Verizon's Petition for Forbearance, CC Docket No. 01-338, at 12 (Sept. 3, 2002).*

[39] *141 Cong. Rec. S7956 (June 8, 1995) (statement of Senator McCain) (quoting from Heritage Foundation letter).*

[40] *In interpreting the "fully implemented" language, it bears repeating that the requirements of section 10(d) are in addition to, not in lieu of, the section 10(a) standards that apply to any forbearance request. Under the latter provision, an applicant generally must show that the requested forbearance will not lead to unjust, unreasonable or unreasonably discriminatory practices by a carrier, will not harm consumers, and is consistent with the public interest. Congress, however, required something more before it granted the FCC the discretion to forbear from enforcing section 251(c) (and section 271 as well).*

Z-Tel Comments pp. 13-16

II. VERIZON'S PETITION DOES NOT SATISFY THE REQUIREMENTS OF SECTION 10.

A. Verizon's Petition Does Not Satisfy the Requirements of Section 10(d).

While Verizon at least attempts to satisfy sections 10(a) and 10(b),[41] it merely states in a conclusory footnote that section 10(d) does not apply.[42] That claim is flatly wrong. Section 10(d) specifically provides that "the Commission may not forbear from applying the requirements of section 251(c) and 271 ... until it determines that those requirements have been fully implemented." Section 10(d) flatly *prohibits* the Commission from forbearing from any requirement of section 251(c) and 271 without that "full implementation" finding. Such a finding has not been made, and Verizon's petition dismisses section 10(d) out-of-hand as not applying to its petition. For these reasons alone, Verizon's petition must be dismissed.

The "requirements" of section 251(c) include cost-based pricing and nondiscrimination. Verizon's petition asks the Commission to abandon these provisions and therefore implicates section 10(d).

Section 251(c)(3) requires network elements to be provided under the standard of section 252(d)(1), which provides that the price for network elements shall be "based on the cost ... of providing the ... network element." In other words, one of the "requirements" of section 251(c)(3) is the cost-based standard of section 252(d). Whatever discretion the Commission retains to adjust its pricing rules for network elements therefore does not include departing from a cost-based approach. The resale pricing rule advanced by Verizon - set forth in a separate subsection of 47 U.S.C. § 252(d) that does not apply to network elements (section 252(d)(3)) - is plainly *not* a cost-based standard. It is an avoided-cost standard that starts with the incumbent's retail rate. Similarly, permitting Verizon to collect access charges on top of the rates it charges competitors for leasing network elements would require a departure from cost-based pricing by permitting double recovery of the cost of providing network elements. Verizon thus necessarily

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[41] *As further set forth* infra *at 16-37, that attempt is unsuccessful.*

[42] *See Verizon Petition at 19 n.38.*

seeks forbearance from section 251(c)(3)'s requirement that rates for network element be set according to the cost-based standard of section 251(d)(1).

In addition, section 251(c)(3) specifically requires that an incumbent provide access to network elements on a "nondiscriminatory" basis. Verizon's proposals would permit it to charge competitors that purchase the UNE platform *a different* and generally *greater* amount for the constituent network elements than competitors that purchase those network elements separately.[43] Because it would let Verizon charge different competitors different prices for the same network elements, the resulting pricing rules would be discriminatory, and, by definition, would implicate section 251(c)(3)'s "requirement" that incumbents provide network elements in a "nondiscriminatory" manner.

Because Verizon seeks a departure from two clear "requirements" of section 251(c) - cost-based pricing and nondiscrimination - Verizon must demonstrate that section 251(c) has been "fully implemented," as required by section 10(d). It has not done so. Instead, as noted above, Verizon merely contends in a footnote that section 10(d) does not apply. Because that contention is erroneous - since Verizon necessarily seeks a departure from the cost based pricing requirement of section 251(c)(3) and that provision's nondiscrimination requirement - its petition may be dismissed for failure to address the requirements of section 10(d).[44]

In addition, Z-Tel finds it inconceivable that the "fully implemented" requirement is met. At the time Verizon filed its petition, *no* set of federal "unbundling rules" under section

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[43] *That is, if Verizon's petition were granted, all of the elements comprising the UNE platform would still be available* individually *at TELRIC rates. For example, a competitor could still purchase a UNE loop or a UNE switch port at a TELRIC rate; only if the competitor bought all of the components of the UNE platform would its price increase. The UNE platform competitor would pay more for the combination of elements than entrants that only bought the individual elements separately.*

[44] *In the final sentence of its footnote concerning section 10(d), Verizon suggests that the requirements of that provision are satisfied once a BOC has been granted authorization under section 271.* See Verizon Petition *at 19 n. 38. That is not sufficient to raise the issue. In any event, as explained in our filings in response to the petition Verizon filed last year seeking forbearance from the section 271 checklist, there is no merit to Verizon's argument.* See *Opposition of Z-Tel Communications, Inc. to Petition for Forbearance of Verizon,* Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), *CC Docket No. 01-338 at 7-11 (filed Sept. 3, 2002). Among other reasons, Verizon's argument is defective because section 271 (d)(6) makes clear beyond dispute that the requirements of the checklist (which incorporate the requirements of section 251(c)) are to remain in effect after a BOC has been authorized to provide long-distance service - and forbearing from those requirements once section 271 authorization has been granted would render that provision a nullity.*

251(c)(3) had every been affirmed by the appellate courts. The *Triennial Review* decision, adopted in February 2003 and ostensibly responsive to the latest remand of the Commission's unbundling rules, has not been released. Moreover, with particular regard to unbundled local switching and UNE platform, the Commission's *Triennial Review Press Release* indicates that State commissions will, over the next nine months, have a large role in determining whether unbundled local switching and the UNE platform should be available in those States.[45] To claim before those State commission implementation proceedings have even begun that section 251(c) has been "fully implemented" with regard to unbundled local switching and the UNE platform is, frankly, nonsense

[45] *See FCC Adopts New Rules For Network Unbundling Obligations of Incumbent Local Phone Carriers, Press Release, Attachment at 1 (Feb. 20, 2003) ("Triennial Review Press Release"). In addition, the Commission has stated that the forthcoming Triennial Review order will "clarify" certain aspects of its existing TELRIC pricing rules, notably depreciation and cost of capital. See id. Accordingly, it is appropriate - if not impossible to act on Verizon's proposal to amend the Commission's current TELRIC pricing rules when the substance of those rules is uncertain.*